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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1157

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Southwestern Bell Telephone Company petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit, affirming the order of the United States District Court for the Eastern District of Missouri, Eastern Division, denying Southwestern Bell Telephone Company's Motion to Reconsider and Withdraw Order Authorizing Trespass on Southwestern Bell Telephone Company Lines and Facilities and To Remove Southwestern Bell Telephone Company from the Provisions of Said Order.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, No. 76-1725, is not reported at this time.[1] The order[2] and memorandum[3] of the District Court is also not reported.

JURISDICTION

The decision of the Court of Appeals for the Eighth Circuit was entered on December 9, 1976. A Suggestion for Rehearing en banc, Petition for Rehearing and Motion for Stay of Mandate, was filed by petitioner on December 23, 1976. The order of the Court of Appeals denying petitioner's Suggestion for Rehearing en banc and Petition for Rehearing was entered January 18, 1977.[4] On January 24, 1977, the Court of Appeals ordered its mandate stayed for thirty days with the provision that if a petition for writ of certiorari was filed within that thirty day period, the stay would continue until the final disposition of the Supreme Court.[5] The jurisdiction of the court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

Whether a United States District Court has authority when the requirements of 18 USC § 2510-2520 and 18 USC § 3771 have not been followed, (1) to authorize FBI agents to electrically tap into a telephone line for the purpose of discovering

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[1] Appendix A, page A-1.

[2] Appendix D, page A-18.

[3] Appendix E, page A-19.

[4] Appendix B, page A-16.

[5] Appendix C, page A-17.

the telephone numbers dialed on the telephone line, and (2) to order a private company to require its employees (not officers of the United States authorized to serve warrants) to provide affirmative assistance to the FBI in perfecting the wiretap and carrying out the surveillance of the persons under investigation.

STATUTES, RULES AND CONSTITUTION INVOLVED

The pertinent portions of the federal statutes, Federal Rules of Criminal Procedure, and United States Constitution involved in this case, because of their length, are set forth in Appendix J, page A-31, to this petition. Included are:

A. The Act of June 29, 1940, authorizing the Supreme Court of the United States to prescribe rules or procedure in criminal proceedings, 18 USCA § 3771. See Appendix J, page A-31.

B. The All Writs Act, 28 USCA § 1651. See Appendix J, page A-31.

C. Rule 41, Federal Rules of Criminal Procedure, setting forth procedure for the issuance, execution and return of warrants to search for and seize property and other tangible objects. See Appendix J, page A-32.

D. Rule 57, Federal Rules of Criminal Procedure, authorizing district courts to make rules for the conduct of criminal proceedings. See Appendix J, page A-34.

E. Section 605 of the Communications Act of 1934, as amended, prohibiting unauthorized publication of communications, 47 USCA § 605. See Appendix J, page A-35.

F. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, protecting privacy of wire and oral

communications and setting forth a procedure for court supervised interceptions, 18 USCA § 2510-2520. See Appendix J, page A-36.

G. United States Constitution, Amendments IV and V. See Appendix J, page A-60.

STATEMENT

In an *ex parte* proceeding the United States Attorney filed an application with the United States District Court for an order to "install mechanical devices commonly described as a pen register" on a telephone line of one of the petitioner's subscribers for the purpose of identifying telephone numbers dialed. The telephone number information sought was to be used in connection with the investigation of the commission of racketeering offenses in violation of Title 18 of the United States Code. It was agreed by the United States Attorney that the crime under investigation was one listed in 18 USC § 2516(1) and for which an application could have been made for a Title III order authorizing the interception. However, no such application was made.

On July 26, 1976, an order[6] was issued by the United States District Court for the Eastern District of Missouri by Judge Wangelin, authorizing the FBI to install mechanical devices on the telephone line and to record by mechanical means the telephone numbers of all outgoing calls dialed from the described telephone for a period of thirty days or until the location and identities of the persons connected with the crimes under investigation were determined. The order expressly did not authorize the interception of voice communications, but only the signals which disclosed the numbers of the outgoing calls. The

[6] Appendix I, page A-29.

court then ordered petitioner to furnish the FBI all information, facilities and technical assistance, including leased lines, necessary to accomplish the interception unobtrusively and with a minimum of interference with petitioner's other services.[7] The order also provided that for the furnishing of such facilities or technical assistance, petitioner was to be compensated by the federal government at prevailing rates. See Appendix I, page A-29. Neither the application nor the order cites any authority for its issuance. It was not issued pursuant to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 USC § 2518).

In brief, what is involved in complying with the court's order is that the FBI asks the telephone company for information as to the location of various terminals where the subscriber line pair appears in the telephone distribution system and the cable number, pair number and binding post number. The FBI, on receiving this information, then selects the terminal location at which it will place the tap and requests that a private line be run from that point to the FBI office in which the surveillance will be conducted. A telephone employee brings into the selected terminal a private line pair which is tagged. An FBI agent makes the tap by physically connecting a tapping device to the subscriber's line, which is designed to prevent feedback and line loss, and then connects the loose ends of the private line pair to the tapping device. The FBI then connects the dialed number recorder (i.e. pen register) to the terminal block of the private line terminated in its office. The dialed number recorder will print on paper tape the date and time whenever the subscriber's receiver is lifted off hook and whenever placed back on hook. It will also print any dialed telephone number or Touch Tone ® keyed number. Pursuant to a Title III authorized interception, a tape recorder may be plugged into the dialed number recorder to record conversations occurring on the line. Earphones may

[7] Appendix H, page A-26.

also be plugged into the dialed number recorder. The involvement of the telephone company in the interception is the same on orders for interception of dialed number information as it would be under an order authorizing interception of telephone conversations.

On July 27, 1976 the United States Attorney sought to have petitioner cited for contempt; and the District Court issued an order to show cause on the application for contempt.[8] Also on July 27, 1976, petitioner, because it questioned the legal authority of the district courts to issue such an order outside the provisions of Title III, filed a motion[9] to reconsider the order and to not authorize the FBI to make any attachments to Southwestern Bell telephone lines[10] and to remove the petitioner from the provisions of the order requiring it to furnish information, technical assistance and special lines to the FBI in order to facilitate the wiretap. On July 30, 1976, the District Court denied petitioner's motion and held the petitioner in contempt for failure to comply with the Court's order of July 26, 1976. See Appendix D and E, pages A-18 and A-19 respectively. Compliance with the District Court order was stayed pending appeal to the Eighth Circuit Court of Appeals. Notice of such appeal was filed July 30, 1976. The appeal was argued and submitted to the court on October 14, 1976. The Court of Appeals rendered its decision on December 9, 1976, affirming the order of the District Court.[11] In reaching its decision, the Court of Appeals, just as did the District Court, rejected petitioner's arguments that (1) the District Court had no statutory or inherent authority to authorize attachments to and surveillance of a tele-

[8] Appendix F, page A-21.

[9] Appendix G, page A-22.

[10] Southwestern Bell has never conceded that the District Court had authority to authorize trespasses on its facilities except pursuant to the Act of Congress, 18 USCA §2518(4)(b), as amended.

[11] Appendix A, page A-1.

phone line by means of a pen register outside the statutory provisions of Title III, 18 USCA § 2510-2520, and that (2) the District Court could not properly order petitioner to provide technical assistance and facilities to federal law enforcement agents in placing and operating a pen register outside the provisions of Title III, 18 USCA § 2510-2520.

The Court of Appeals agreed that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 USCA § 2510-2520,[12] prescribes the procedure for securing judicial authority to intercept wire communications. It then cited several cases it felt rejected the contention that pen register interceptions fall within the purview of Title III.

The Court of Appeals then reasoned that the applicability of Title III to pen registers turns on the definition of "interception" of wire communications. Under 18 USC § 2510(4) "interception" is defined as the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." The court concluded that aural acquisition by definition engages the sense of hearing and that since a pen register does not possess the sense of hearing, it falls outside Title III prohibitions.

The court stated that the legislative history of Title III supports this conclusion and cited Mr. Justice Powell's concurring and dissenting opinion in *U.S. v. Giardano*, 416 US 505, 553-554 (1974) which interprets that legislative history.

The court subsequently held that the propriety of a pen register's usage depends entirely upon compliance with the Fourth Amendment, rather than Title III. The court reasoned that the District Court's power to order pen register surveillance is the equivalent of the power to order a search warrant and is inherent in the District Court.

[12] Appendix J, page A-38.

The court then went on to consider that portion of the order requiring petitioner to provide affirmative assistance. The court looked to the Congressional amendments to Title III which took cognizance of the decision of the Ninth Circuit in *Application of the U.S.*, 427 F2d 639 (9th Cir. 1970), holding that a District Court has no statutory or inherent authority to enter such an order, even in conjunction with a valid Title III order. The Congressional amendments in 1970 gave the District Court such authority for Title III orders. D.C. Court Reform Act, Title II, Section 211, July 29, 1970, Public Law 91-358, 84 Stat. 654. The Court of Appeals for the Eighth Circuit reasoned that the quick reaction of Congress in passing these amendments after the Ninth Circuit decision provided strong and persuasive authority for the proposition that Congress presumed that the District Courts, in the area of electronic surveillance, inherently have the power to compel compliance with an order requiring affirmative assistance by communication common carriers.

The court also cited the decision of the Seventh Circuit in *U.S. v. Illinois Bell Telephone Company*, 531 F2d 809, 811 (7th Cir. 1976), holding that a District Court has inherent authority to order the telephone company's assistance.

The Eighth Circuit reasoned that the inherent power of the District Court to order pen register surveillance would be a nullity without the authority to compel the assistance of the petitioner, and that such power was "in a sense" concomitant of the power to authorize pen register surveillance. The court concluded that to hold otherwise would allow the telephone company rather than the District Court to decide when pen register surveillance should be used, and that, on the record, it could find no abuse of discretion by the District Court in ordering petitioner's assistance.

REASONS FOR GRANTING THE WRIT

I

The Supreme Court should grant petitioner's request for writ of certiorari for the reason the court has granted the United States Government's petition for writ of certiorari in a similar case on January 25, 1977, styled *United States v. New York Telephone Company*, No. 76-835, to review the decision of the Court of Appeals for the Second Circuit, reported at 538 F2d 956.

The question presented in that case, as stated at 45 LW 3499, is:

> "May the U.S. district court, as part of admittedly valid order authorizing use of pen register to investigate gambling offense being committed by means of telephone, properly direct telephone company to provide federal law enforcement agents with facilities and technical assistance necessary for implementation of court's order, in absence of legislation expressly authorizing such order?"

Petitioner in this case has never conceded the issue of whether the district court has the power to authorize FBI agents to trespass on its lines to tap the telephone of one of its subscribers. On the contrary, petitioner has steadfastly asserted that such an order, in the absence of statute and Congressionally mandated standards, violates the right of privacy of petitioner's subscribers under the Fourth Amendment and petitioner's property rights under the Fifth Amendment. A total and final resolution of the legal issues suggested by the Second Circuit case cannot be resolved unless the facts and issues of this case in the Eighth Circuit are also considered.[13]

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[13] Petitioner intends to move to consolidate the two cases.

II

The United States district courts, in authorizing wire taps for dialed telephone number interception, outside the purview of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, raise substantial unresolved questions, both as to the proper relationship between the legislative and judicial branches of the United States Government, and as to the proper deference which district courts should observe respecting authority of the Supreme Court under 18 USC § 3771.

Traditionally, district courts have been created and their rules of criminal procedure have been determined by Congress. In the Act of June 29, 1940, as amended and revised, 18 USC § 3771, Congress delegated to the Supreme Court authority to initiate rules of criminal procedure, which Congress then approves either tacitedly by inaction or actually by statute. The Federal Rules of Criminal Procedure Amendments Act of 1975, P.O. 94-64, § 1, July 31, 1975, 89 Stat. 370, is indicative of the fact that Congress jealously guards and exercises the rights it has reserved to itself.

The *ad hoc* order of the district court, in permitting search for and seizure of *intangible intelligence* of acts to be committed by persons in the future (i.e. time of dialing, the number dialed and time duration of the call), certainly cannot be considered as being anticipated by Rule 41, relating to search and seizure of *tangible property*. Supreme Court guidance is needed to decide when rules promulgated by district courts, such as the electronic search warrant involved here, are so new and innovative as to constitute a substantive change in the rules of criminal procedure and are violative of the requirements of 18 USC § 3771.

III

The legal rationale of the Courts of Appeals in affirming district court non Title III pen register orders is hopelessly confused and a decision of the Supreme Court is needed to clarify the legal basis for such orders, if further and protracted litigation over these issues is to be avoided.

In *Application of United States*, 427 F2d 639 (9th Cir. 1970) the government sought an order to intercept and record telephone conversations pursuant to the provisions of 18 USC § 2510-2520. The government also asked the district court to order The Central Telephone Company of Nevada to provide assistance and facilities to effectuate the wiretap. The district court denied the request for a directive against the company and the government appealed. On appeal the government conceded that 18 USC § 2510-2520 as passed by Congress did not contain any express provision conferring on the courts the power to compel telephone company assistance, but argued that the power was implied or could be inferred from other laws. The Court of Appeals rejected this contention and said:

> "In view of the breadth and apparent self-sufficiency of this general statute, and the total absence of any provision even hinting that the court is to have authority to enter such a unique order as the Government here seeks, we think the existence of such authority is not lightly to be implied from the Act. Nor do we find any provision in the Act, or in the history of its enactment, which points in the direction of implied authority. Quite to the contrary, consideration of the constitutional signficance of the legislation, the relevant provisions of the Act, and the legislative history tend in the opposite direction.
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>
> Nor, insofar as the record before us would indicate, is the implication of such a power necessary in order to give the

Act any room for operation. It may or may not be true that, in this particular case, it is an absolute impossibility for the Federal Bureau of Investigation to effectuate the desired interception for which approval was sought, without the active assistance of the company. But it is common knowledge that there can be, and frequently has been, wiretapping of telephone lines without the assistance or even the knowledge of the telephone company. For all that the Act and its legislative history disclose, Congress meant to limit approved interceptions to those which could be accomplished without the active assistance of the carrier, or at least to those in which that assistance would be forthcoming on a voluntary basis." Id. at 643-644

After this decision, Congress amended the statute to give the courts power to compel telephone assistance in Title III cases. D.C. Court Reform Act, P.L. 91-358, Title II, § 211, July 29, 1970, 84 Stat. 654.

The first non Title III case to reach the Courts of Appeals was *In re Joyce*, 506 F2d 373 (5th Cir., Jan. 9, 1975). This case resulted from the appeal of a criminal contempt citation against a security officer of Mountain States Telephone and Telegraph Company for refusing to comply with an order, issued by a federal Magistrate and approved by the United States District Court for the Western District of Texas, to participate with federal customs agents in the installation of an electronic surveillance device known as a "pen register", (also known as a dialed number recorder).

The security officer had refused to assist the federal agents because the pen register order had not been issued under the authority of 18 USC § 2510-2520. The fifth Circuit held that the evidence was insufficient for the district court to find that the security officer had willfully refused to obey the court's order. Consequently, the Court of Appeals reversed the contempt judg-

ment and expressly refused to consider the substantive law issues in the case. The court said:

> "In addition, our disposition renders it unnecessary to consider the other issues briefed by the parties; (1) whether a 'pen register' order unaccompanied by a wiretap application is within or without Title III; (2) whether compliance with the order in this case might have subjected Mountain Bell and/or appellant to civil or criminal liability; (3) whether a federal court has the authority to order a wire carrier or its employees to participate with law enforcement officials in the installation of a 'pen register' pursuant to the court's power to issue search warrants; . . ." *Id.* at 379.

The government did not appeal.

The Fifth Circuit, in the case of *Southern Bell Telephone and Telegraph Company v. U.S.*, 541 F2d 1151 (5th Cir., Nov. 5, 1976) in which the pen register issue became moot, did note the importance of answering these questions. Id. at 1156. In that case the pen register order to seize intangible intelligence had been issued pursuant to Rule 41, Federal Rules of Criminal Procedure, which, as noted, is by its terms limited to search and seizure of the tangible property. Southern Bell contested both the jurisdiction of the district court to authorize use of a pen register on telephone lines and the order requiring its assistance. The court noted:

> "As the use of the pen register as a surveillance tool has grown, and as courts in different jurisdictions have responded with differing voices to the legal issues posed by its use, we have become increasingly aware that we—and the District Court in acting on stays pending review-must still the clamor in the Fifth Circuit by taking the steps necessary in the future to make sure that the controversy reaches us while it is still alive. Thus, in any future case raising these issues, absent a substantial representation by

the Government that delay would frustrate the Government's legitimate investigative efforts, the District Court should seriously consider a stay to permit review on an emergency basis by this Court. At the same time, we are acutely aware of our own responsibilities to expedite the appeal of any future case raising these issues while a stay order is in effect." Id. at 1155.

In *Application of U.S.*, 407 F. Supp. 398 (W. D. Mo., Jan. 19, 1976) District Judge Oliver refused to grant the United States Attorney's application for a pen register order outside the scope of Title III, 18 USC §2510-2520. In that case the government conceded that its first application, founded on Rule 41, Federal Rules of Criminal Procedure, was improper. Its second application was supported by the assertion that the All Writs Act, 28 USC §1651(a), gave the court authority to issue the newly devised warrant. The court said:

> "Nor does the All Writs Act vest this Court with any independant jurisdictional power to design *ad hoc* procedures to authorize the use of a pen register device in connection with investigation of alleged offenses outside of the scope of Title III." Id. at 405.

The court declared that it must be assumed that Congress knew Section 605 of the Communications Act of 1934 forbade the use of pen register devices by police agencies and that unless Congress took affirmative action to remove the prohibition, the ban would continue. The court concluded that enactment of Title III did not remove the ban, but rather the procedures of Title III controlled the use of all devices used for electronic surveillance, including pen registers. The court also followed the holding in the Ninth Circuit, that absent a statute, the court had no authority to direct a telephone company to assist the FBI in carrying out the electronic surveillance.

The government did not appeal.

The next decided case was *U.S. v. Illinois Bell Telephone Company*, 531 F2d 809 (7th Cir., Feb. 23, 1976). Apparently Illinois Bell did not contest the issue of whether government law enforcement agents could lawfully tap subscriber lines to obtain dialed number information. The legality of that order was presumed. It did contest the issue of whether the court could compel it to assist the agents in doing so. The Fifth Circuit concluded, without citation, that:

> "We conclude that the district court had inherent authority[2] to order the telephone company's assistance in this case."

n.[2] The inherent authority of the district court, made necessary by the special nature of electronic communications, is not directly derived from Fed.R.Cr.P. 41 which governs the search and seizure of 'tangible' objects nor from Title III of the Omnibus Crime Control and Safe Streets Act, 18 USC §§2510-2520, which governs wiretapping and electronic surveillance, although by analogy, these statutes are supportive in this regard. See discussion infra." Id. at 811.

The Court of Appeals decided that Title III, 18 USC § 2510-2520, did not prohibit use of pen register interceptions and consequently, the district court was at liberty to do whatever it concluded appropriate so long as it designed a procedure compatible with Fourth Amendment considerations. It approved the district court's "common sense" approach in reasonably allowing use of investigative techniques rendered possible by modern technology for discovery and seizure of "intangibles."

On the issue of ordering telephone company assistance, the Seventh Circuit said that Congress' reaction to the Ninth Circuit decision, by granting authority to compel assistance, was so prompt that it could only be concluded that Congress presumed the courts already had authority to compel telephone company assistance under Title III orders. See D.C. Court Reform Act, P.L. 91-358, Title II, § 211, July 29, 1970, 84 Stat. 654. The court does not state what prior law or judicial

precedent upon which Congress might reasonably have based its presumption. The court did state that:

> "We believe that Congress' amendments to Title III in this regard provide strong and persuasive authority, by analogy, for the proposition that district courts in the area of electronic surveillance, inherently have power to effectively compel compliance with validly issued orders. It seems more congruent with both reason and Congressional intent to have courts, rather than the telephone company, decide if a pen register should or should not be used. The authority to compel the cooperation of the telephone company is in a sense concomitant of the power to authorize the installation of a pen register, for without the former the latter would be worthless."
>
> "[7, 8] It is conceded that the district court had authority to enter an order authorizing government law enforcement agents to employ a pen register. Therefore, analogous authority for the proposition that the telephone company cannot frustrate the exercise of the district court's order by refusing to make available its facilities and know-how, is the All Writs Act." *Id.* at 814.

Encouraged by the Seventh Circuit opinion, the Department of Justice filed a pen register application in New York for its organized crime strike force. Again the telephone company did not seek to protect the privacy of its subscribers or its own property from the intrusion. In the lower court it objected only to so much of the order as directed it to provide assistance. The district court, in *Application of U.S.*, 416 F. Supp. 800 (S.D. N.Y., April 2, 1976) found that Congress specifically intended to exclude pen registers from the application of Title III procedures. The court then stated:

> "Refusal of Telephone to assist in furnishing technical assistance and facilities would frustrate the operation of the court's order, properly granted upon a showing of probable cause." *Id.* at 803.

The district court adopted the assertedly "sound reasoning of the Seventh Circuit" in the *Illinois Bell* case, *supra*, that the order was a common sense application of the court's inherent authority. It specifically found jurisdiction for its directive to the telephone company under the All Writs Act.

As the Supreme Court is aware, the Second Circuit affirmed on appeal that part of the order authorizing use of a pen register and reversed that part ordering telephone company assistance. In the case *Application of U.S.*, 538 F2d 956 (2nd Cir. July 13, 1976), the Court of Appeals concluded that while the district court had the power to issue the order, it constituted an abuse of discretion for the court to order telephone company assistance. *Id.* at 962. It agreed with the Ninth Circuit in *Application of U.S.*, 427 F2d 639, 644 (9th Cir. 1970) that the government should address its plea to Congress. The court stated:

> "Perhaps the most important factor weighing against the propriety of the order is that without Congressional authority, such an order could establish a most undesirable, if not dangerous and unwise, precedent for the authority of federal courts to impress unwilling aid on private third parties. We were told by counsel for the Telephone Company on the oral argument of this appeal that a principal basis for the opposition of the Telephone Company to an order compelling it to give technical aid and assistance is the danger of indiscriminate invasions of privacy. In this best of all possible worlds it is a law of nature that one thing leads to another. It is better not to take the first step." *Id.* at 962.

On the issue of whether the district court had authority to authorize the wiretap in the first instance, the Second Circuit

determined that neither Title III, 18 USC § 2510-2520 nor Section 605 of the Communications Act precluded use of pen registers. The telephone company had argued in the Court of Appeals that the district court had no authority to issue the order authorizing the installation and use of a pen register. The government argued that the court had inherent power under Rule 41, Federal Rules of Criminal Procedure—The court ruled:

> "In our view, the power to order pen register surveillance, whether considered a logical derivative of Rule 41 or a matter of inherent judicial authority, is the equivalent of the power to order a search warrant, and is thus subject to the requirements of the Fourth Amendment. As the order authorizing the installation and use of a pen register was here issued by Judge Tenney upon a showing of probable cause, we conclude that it was properly granted." *Id.* at 960.

The government appealed this case and its petition for writ was granted on January 25, 1977 and assigned docket No. 76-835.

In the instant case, the district court, in its memorandum opinion, *Application of U.S.*, No. 76 Misc. 58 (E.D. Mo., July 30, 1976), see Appendix E, page A-19, declared that it had inherent authority and power under the All Writs Act, 28 USC § 1651(a), to compel the cooperation and assistance of Southwestern Bell in implementing the use of a pen register, citing the Seventh Circuit decision, *U.S. v. Illinois Bell, supra.* The court also declared that pen register orders involve a search and seizure under the Fourth Amendment and, consequently, the court may issue such an order upon a showing of probable cause.

On appeal to the Eighth Circuit, the Court of Appeals in *Application of U.S.*, No. 76-1725 (8th Cir. Dec. 9, 1976), see

Appendix A, rejected petitioner's argument that Title III procedures must be followed for wiretaps involving dialed number interceptions. The court stated at page 5 of the slip opinion:

> "The court's power to order pen register surveillance is the equivalent of the power to order a search warrant and is inherent in the district court.[5]

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n.[5] The unusual character and technological advances of electronic communications have occasioned the surfacing of this inherent authority. Although Fed. R. Crim. P. 41 governs the search and seizure of tangible objects, it is, by analogy, supportive of our conclusion."

On the basis of a finding in the district court that the FBI could not carry out the court's order, the Court of Appeals concluded at page 7 of the slip opinion:

> "In view of this finding, the inherent power of the district court to order pen register surveillance would be a nullity without the authority to compel the assistance of the telephone company. It is in a sense concomitant of the power to authorize pen register surveillance. *United States v. Illinois Telephone Co.*, supra, 531 F2d at 814. Therefore, we hold as did the Seventh Circuit, that the district court had inherent authority to order the telephone company's assistance."

The Court of Appeals expressly found that the district court's order directing telephone company assistance was not an abuse of discretion. Consequently, the decision is in conflict with both the Second and Ninth Circuit opinions.

The Eighth Circuit has found that the district court has inherent authority to order pen register surveillance and, so that this inherent power might not be frustrated, it has found the district court has the further inherent authority to order the telephone company's assistance. No precedent is cited, even for the proposition that the district court has inherent power, absent Rule 41, to issue search warrants. It is pointed

out in the dissenting opinion of Judge Lay that even if Rule 41 is used by analogy the district court order omits to provide the Fourth Amendment safeguards of service of the warrant by a federal officer and notice to the party concerned. Judge Lay also concluded that Title III is the exclusive procedure set down by Congress for conducting electronic surveillance and, therefore, pen register orders must be governed by the safeguards prescribed by Title III. Judge Lay said at page 16 of the slip opinion:

> "The majority's rationale is surely dangerous precedent. Judicial authority to compel a private party to assist the government in the invidious act of electronic surveillance should be based on defined authority. Wire interception of any communication constitutes a direct invasion of privacy. Congress initially outlawed all wire interceptions. Act of June 19, 1934, c. 652, Title VI, §605, 48 Stat. 1103 (Federal Communications Act) (amended 1968). Subsequently Congress carefully studied limited circumstances where wire interceptions could be utilized, subject to constitutional safeguards. The result of that study was the passage of Title III. Under that Act, Congress authorized wire interceptions for the investigation of specific crimes, as long as the safeguards of minimization and supervision by the court were evinced. It is troublesome to me that we now not only authorize government agents, but compel a resisting private corporate enterprise, to conduct pen register surveillance without court supervision. It is conceded by the parties that such surveillance can be abused and that private conversations on touch-tone telephone (as involved here) can be intercepted. *Cf. United States v. Harvey, supra.*
>
> To me it is wrong that the judicial branch of government can thwart congressional intent and purpose by conjuring up some convenient, mystical authority through the pseudonym of 'inherent power.' "

IV

The Court of Appeals in approving pen register interceptions outside of Title III procedures have relied in part on the statement of Justice Powell in his concurring and dissenting opinion in *U.S. v. Giordano*, 416 US 505, 553 (1974), that pen register monitoring and recording of telephone numbers is not governed by Title III. The rationale for the statement is his conclusion that pen registers do not "hear" sound and Title III only prohibits aural acquisition of the contents of wire communications. Included in his opinion is a description of a pen register which is factually inaccurate with regard to currently used pen registers. See note 1 at 416 US 549. The dialed number recorders currently in use do stamp the date and time incoming calls are completed and record the date and time outgoing calls are initiated and terminated. Moreover, they also "hear" the Touch Tone ® sounds and record the numbers they represent. A VU meter (volume unit) will also indicate conversation in progress.[14]

There has been some indication that pen register interceptions constitute a lesser privacy invasion than recorded voice interceptions. For innocent citizens this may not be the case. A lawful call from a suspect's wife to a school teacher will be recognized as innocent and disregarded where the conversation is monitored. In pen register situations, the call places the school teacher on a list of suspects. His or her innocence will now have to be determined by actual surveillance and police interviews with the teacher's neighbors, fellow workers, and supervisors. The extent to which pen register interceptions constitute impermissible invasions of privacy is an issue that this court should consider based on the actual capabilities of those pen registers and dialed number recorders currently used by the Department of Justice.

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[14] The Bushnell pen register, Appendix K, page A-61, is described in footnote 1, *U.S. v. Focarile*, 340 F. Supp. 1033, 1038 (Md. 1972). A transitional tone decoder, with dial add on, is described in the same case starting at page 1039. Petitioner's case involves the use of the Hekimian dialed number recorder. See Appendix K, page A-61.

V

After years of study, hearings and debate, Congress passed a comprehensive statute, 18 USCA §2510-2520, authorizing under strict regulation the electronic seizure of intelligence transmitted between two citizens. The Fourth Amendment protections are elaborate, allowing for this type of intrusion only after all other investigative techniques have been exhausted, limiting the intrusion to only certain specified crimes and then only in those cases of such serious importance to the public as to warrant the personal attention of the Attorney General of the United States or his specially designated Assistant Attorney General.

The statute also provides, 18 USCA §2518(8)(d), for notice, within ninety days after the application to the citizen whose privacy was invaded, of the fact that an order of interception was entered and the right to inspection of the intelligence seized. The district court's order in this case provided only that the intrusion be limited to thirty days and did not provide for other Fourth Amendment protections corresponding to or analogous to that provided by Congress in 18 USC §2510-2520 or to that provided by the Supreme Court in Rule 41, Civil Rules of Criminal Procedure.

Section 2519 of Title 18, United States Code, provides for extensive reporting to Congress of all electronic surveillance orders under Title III. The order of the district court outside of Title III, circumvents the review and control procedures set up by Congress to oversee government use of electronic surveillance devices.

The case presents to the court the question of whether or not the procedures set forth in 18 USC §2510-2520 are not the exclusive procedures to be followed in authorizing electronic surveillance; and, if not, whether the district court abused its discretion in fashioning an order that did not provide for Fourth and Fifth Amendment protections for petitioner and its telephone subscribers, corresponding to those Congress required in 18 USC §2510-2520.

CONCLUSION

Petitioner, as a telephone company, has a special responsibility to foster and safeguard the privacy of communications. Persons have an inherent right to feel that they can use the telephone with the same degree of privacy they have when talking face to face. Any undermining of this confidence would seriously impair the usefulness and value of telephone communications. Given the extent to which social and business intercourse is today conducted by telephone, any undue disclosure of the use of the telephone is inconsistent with the rights of a free society. The minimum safeguards necessary to be observed for dialed number interceptions should be set forth either by Congressional statute or by Supreme Court rule, in a fashion similar to the standards provided in Rule 41, Federal Rules of Criminal Procedure, and 18 USC §2510-2520. Petitioner does not desire to participate in criminal investigative procedures that have not been expressly authorized by Congress or promulgated by the Supreme Court of the United States. Accordingly, petitioner respectfully requests favorable consideration of its Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Appendix A Decision of U.S. Court of Appeals, 8th Circuit

Appendix B Order Denying Petition for Rehearing

Appendix C Order Granting Stay

Appendix D Order of District Court

Appendix E Memorandum of District Court

Appendix F Order to Show Cause

Appendix G Motion to Reconsider and Withdraw Order

Appendix H Application for Order to Show Cause

Appendix I Order Authorizing Installation and Use of Pen Register

Appendix J Constitution, Statutes and Rules Involved

Appendix K Pen Registers

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 76-1725

Application of the United States for an Order Authorizing Installation and Use of a Pen Register United States of America, Appellee, v. Southwestern Bell Telephone Company, a Missouri Corporation, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 14, 1976

Filed: December 9, 1976

Before Lay, Ross and Stephenson, Circuit Judges.

Stephenson, Circuit Judge.

This case involves the government's application for an order authorizing the installation and use of a pen register[1] and di-

[1] The pen register is a mechanical device whose basic function is to record numbers dialed at a telephone. Although pen register devices available to federal agents have the capability of audio interception of the conversation of the parties to a call, in this case the district court's order does not permit monitoring or recording the conversations themselves. The federal agent stated during the ex parte proceeding that he would disable these features of the pen register.

recting the Southwestern Bell Telephone Company to provide facilities, information and technical assistance to special agents of the Federal Bureau of Investigation in the installation and use of the device. Southwestern Bell contends in this appeal that the district court[2] erred in authorizing the use of the pen register and in ordering appellant to provide technical assistance to the government. We affirm the order of the district court.

In an in camera ex parte proceeding on July 26, 1976, the United States Attorney sought and received the permission of the district court to install and monitor a pen register device to identify the outgoing telephone numbers dialed from a particular telephone. An affidavit signed by a Federal Bureau of Investigation agent set forth facts which disclosed probable cause to believe the telephone in question was being used to further the commission of a racketeering offense prohibited by Title 18, United States Code. Although the offense is one for which governmental electronic surveillance is permitted by the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, the United States Attorney did not make the application thereunder. The order issued by the district court affirmatively required Southwestern Bell Telephone Company to "furnish the applicant forthwith all facilities including lease lines, information, including the identification of leased line pairs, subscriber pairs and the location of a suitable junction box where a connection can occur, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is providing."[3]

On July 27, 1976, the appellant moved the district court to reconsider its order and to remove the appellant from the

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[2] The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri.

[3] The order also provided that the furnishing of such facilities or technical assistance was to be compensated for by the applicant at the prevailing rates.

provisions of the order. On July 30, 1976, the district court denied appellant's motion and held appellant in contempt for failure to comply with the order of July 26, 1976. No citation was issued and compliance with the order was stayed pending appeal to this court.[4] We will consider separately the two substantial questions raised on this appeal: first, whether the district court erred in holding that pen register orders are not covered by Title III of the Omnibus Crime Control and Safe Streets Act of 1968; and second, whether it erred in ordering the appellant to provide technical assistance to the government.

I

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses. *United States v. Giordano*, 416 U.S. 505, 507 (1974). Appellant contends that pen register devices fall within the purview of Title III. The greater weight of authority, however, is contrary to that position. *United States v. Giordano, supra*, 416 U.S. at 553-54 (Powell, J., concurring in part and dissenting in part); *United States v. Illinois Bell Telephone Co.*, 531 F.2d 809, 812 (7th Cir. 1976); *United States v. Clegg*, 509 F.2d 605, 610 (5th Cir. 1975); *United States v. Falcone*, 505 F.2d 478, 482 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); *United States v. Brick*, 502 F.2d 219, 223 (8th Cir. 1974); *United States v. Finn*, 502 F.2d 938, 942 (7th Cir. 1974); *Korman v. United States*, 486 F.2d 926, 931 (7th Cir. 1973).

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[4] Appellant contends in this appeal that the district court erred in holding Southwestern Bell Telephone Company in contempt. Although this finding of contempt is questionable in light of appellant's prompt motion for reconsideration, we refuse to reverse the finding since no sanctions were imposed and compliance with the order was stayed pending appeal.

Title III's applicability to a pen register device turns on the definition of an "interception" of wire communications. "Interception" as defined by 18 U.S.C. § 2510(4) is "the *aural* acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device" (emphasis added). An "aural acquisition" by definition engages the sense of hearing. *United States v. Falcone, supra,* 505 F.2d at 482. The pen register device does not possess this sense. It acquires its information (the recording of numbers dialed at a telephone) by interpreting and printing out electric pulses. The conclusion is therefore inescapable that a pen register device falls outside the ambit of Title III. This conclusion is bolstered by the legislative history of the Act. As Mr. Justice Powell stated in a concurring and dissenting opinion, joined by Chief Justice Burger, Mr. Justice Blackmun, and Mr. Justice Rehnquist, in *United States v. Giordano, supra,* 416 U.S. at 553:

> The installation of a pen register device to monitor and record the numbers dialed from a particular telephone line is not governed by Title III. This was the conclusion of the District Court in the instant case and of the courts in *United States v. King,* 335 F. Supp. 523, 548-549 (SD Cal. 1971), and in *United States v. Vega,* 52 F. R. D. 503, 507 (EDNY 1971). This conclusion rests on the fact that the device does not hear sound and therefore does not accomplish any "interception" of wire communications as that term is defined by 18 U.S.C. § 2510(4)—"the *aural* acquisition of the *contents* of any wire or oral communication through the use of any electronic, mechanical, or other device" (emphasis added). Any doubt of the correctness of this interpretation is allayed by reference to the legislative history of Title III. The Report of the Senate Committee on the Judiciary in discussing the scope of the statute explicitly states "[t]he use of a 'pen register,' for example,

> would be permissible." S.Rep.No. 1097, 90th Cong., 2d Sess., 90 (1968).

It is our view that the properiety of a pen register's usage depends entirely upon compliance with the Fourth Amendment rather than Title III. *United States v. Giordano, supra,* 416 U.S. at 553-54 (Powell, J., concurring in part and dissenting in part); *United States v. John,* 508 F.2d 1134, 1141 (8th Cir.), *cert. denied,* 421 U.S. 962 (1975). The court's power to order pen register surveillance is the equivalent of the power to order a search warrant and is inherent in the district court.[5] It is clear upon the record before us that the district court issued the order based upon a showing of probable cause. We conclude that the district court's approach, with all of the attendant Fourth Amendment safeguards, was a valid exercise of authority. *Application of the United States in re Order Authorizing the Use of a Pen Register,* 538 F.2d 956 (2d Cir. 1976); *United States v. Illinois Bell Telephone Co., supra,* 531 F.2d at 812-13.

II

Appellant's second contention is that the district court erred in ordering the appellant to provide technical assistance to the government.[6] In support of this argument appellant cites *Ap-*

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[5] The unusual character and technological advances of electronic communications have occasioned the surfacing of this inherent authority. Although Fed R. Crim. P. 41 governs the search and seizure of tangible objects, it is, by analogy, supportive of our conclusion.

[6] Appellant's contention is based in part on a concern for possible exposure to civil and criminal liability. Although this question is not before us, it should be noted that 18 U.S.C. § 2520 states that "[a] good faith reliance on a court order • • • shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law." The district court also found, in its memorandum filed July 30, 1976, and incorporated in its order of the same date, that compliance by Southwestern Bell Telephone Company with the court's order would be a complete defense to any claim of criminal or civil liability.

plication of the United States, 427 F.2d 639 (9th Cir. 1970), and the Congressional action which followed. In that case the government had obtained a valid wiretap order pursuant to Title III and the question arose whether the district court had inherent authority to compel the cooperation of the telephone company. The Ninth Circuit concluded that the district court had no statutory or inherent authority to enter such an order. *Application of United States, supra*, 427 F.2d at 644. Soon after this decision Congress adopted amendments to Title III which authorized the district court to direct that a communication common carrier furnish all information, facilities, and technical assistance necessary. 18 U.S.C. § 2518(4). Appellant argues that the Congressional reaction to the Ninth Circuit decision was in the nature of an acceptance of the views expressed therein. The clear Congressional intent, according to appellant, was to authorize active participation on the part of the telephone company only in connection with orders issued under Title III.

An equally persuasive argument can be made, however, that the Congressional reaction was more in the nature of an overruling of the Ninth Circuit opinion. Congress may have originally presumed that power existed in the courts to compel compliance with orders authorizing electronic surveillance. *United States v. Illinois Bell Telephone Co., supra*, 531 F.2d at 813-14. When faced with the Ninth Circuit decision, Congress reacted by legislating in an area where they had presumed the court's inherent power was sufficient. In this light Congress' amendments to Title III provide "strong and persuasive authority, by analogy, for the propostion that district courts in the area of electronic surveillance, inherently have power to effectively compel compliance with validly issued orders." *United States v. Illinois Bell Telephone Co., supra*, 531 F.2d at 814.

More important than the interpretation of Congressional action, however, is the district court's finding in its memorandum of July 30, 1976. There it was stated "[t]hat without the in-

formation, leased lines and assistance [of Southwestern Bell Telephone Company] the Federal Bureau of Investigation cannot carry out the Order of this Court." In view of this finding, the inherent power of the district court to order pen register surveillance would be a nullity without the authority to compel the assistance of the telephone company. It is in a sense concomitant of the power to authorize pen register surveillance. *United States v. Illinois Bell Telephone Co., supra*, 531 F.2d at 814. Therefore, we hold as did the Seventh Circuit, that the district court had inherent authority to order the telephone company's assistance.[7] *United States v. Illinois Bell Telephone Co., supra*, 531 F.2d at 811. To hold otherwise would effectively allow the telephone company rather than the district court to decide when pen register surveillance should be used. On the record before us we find no abuse of discretion by the district court in directing that the telephone company render

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[7] An argument can be made that the All Writs Act gives the district court the power to compel the telephone company's assistance. As stated by the Seventh Circuit:

> Therefore, analogous authority for the proposition that the telephone company cannot frustrate the exercise of the district court's order by refusing to make available its facilities and know-how, is the All Writs Act. The All Writs Act, 28 U.S.C. § 1651 provides in pertinent part:
>
> > (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> This statute allows a district court to defend a proper exercise of its jurisdiction, although it does not supply jurisdiction.

United States v. Illinois Bell Telephone Co., supra, 531 F.2d at 814 (footnote omitted).

The Second Circuit assumed arguendo that a district court has inherent discretionary authority or discretionary power under the All Writs Act to compel technical assistance by the telephone company, but concluded that in the absence of specific and properly limited Congressional action it was an abuse of discretion to order the telephone company to furnish technical assistance. *Application of the United States in re Order Authorizing the Use of a Pen Register, supra*, 538 F.2d at 960-63.

assistance. *See Application of the United States in re Order Authorizing the Use of a Pen Register, supra,* 538 F.2d at 964-66 (Mansfield, J., dissenting).

Affirmed.

Lay, Circuit Judge, Dissenting.

I respectfully dissent.

In *Application of the United States,* 427 F.2d 639 (9th Cir. 1970), the government appealed from the United States District Court for the District of Nevada's refusal to require the telephone company to assist the F.B.I. in an investigation pursuant to a valid Title III wire interception. The government argued that the *posse comitatus* rule authorized the court to order telephone company assistance. The Ninth Circuit ruled:

> We are not convinced that the authority which the Government would have the court exercise, to compel a telephone company to assist in the investigation of suspected law violators can be derived, by analogy, from the power law enforcement officers may have to assemble a *posse comitatus* to keep the peace and to pursue and arrest law violators. *Nor do we find, outside Title III, any district court authority, statutory or inherent, for entry of such an order. We think the district court correctly decided that it was without power to grant the relief requested. If the Government must have the right to compel regulated communications carriers or others to provide such assistance, it should address its plea to Congress.*

427 F.2d at 644 (emphasis added).

Thereafter the government applied to Congress for express statutory authority to require the needed assistance and Congress

amended Title III to provide for such assistance. *See* 18 U.S.C. §§ 2511(2)(a)(ii), 2518 and 2520.[1]

It is inconceivable to me that although congressional action was necessary to supply the requisite court authority to compel telephone company assistance for wire interceptions under Title III, this court can find some *inherent* power to require such assistance when an application is made for use of a pen register *outside* of the safeguards of Title III. This makes little sense.

The majority opinion adopts the reasoning used by the Seventh Circuit in *United States v. Illinois Bell Telephone Co.,* 531 F.2d 809 (7th Cir. 1976). They urge that congressional reaction to the Ninth Circuit decision can be explained by stating that Congress was legislating in an area where it had presumed the court's inherent power was sufficient. The majority reasons,

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[1] 18 U.S.C. § 2511(2)(a)(ii) reads:

> It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter [18 USCS §§ 2510-2520], is authorized to intercept a wire or oral communication.

18 U.S.C. § 2518 provides, in pertinent part:

> An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

18 U.S.C. § 2520 states, in pertinent part:

> A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter [18 USCS §§ 2510-2520] or under any other law.

on this theory, that Congress' amendments to Title III "provide strong and persuasive authority, by analogy, for the proposition that district courts in the area of electronic surveillance, inherently have power to effectively compel compliance with validly issued orders." *See also United States v. Illinois Bell Telephone Co., supra,* 531 F.2d at 814.

With all due respect to my learned brothers on the Seventh Circuit, this reasoning is difficult to follow. It provides an innovative explanation, but certainly a strange and new principle in the area of statutory construction. I always thought it was a fundamental rule of statutory construction that Congress does not legislate needlessly. *See Uptagrafft v. United States,* 315 F.2d 200, 204 (4th Cir. 1963); *Mogis v. Lyman-Richey Sand & Gravel Corp.,* 189 F.2d 130, 141 (8th Cir. 1951); and *Continental Ill. Nat'l Bank & Trust Co. v. United States,* 403 F.2d 721, 724 (Ct.Cl. 1968), *cert. denied,* 394 U.S. 973 (1969).

Contrary to the Ninth Circuit's holding, the majority opinion does find "inherent authority" to compel the telephone company's assistance in the area of electronic surveillance. The majority opinion evidently does not find this inherent power under the All Writs Act, 28 U.S.C. § 1651,[2] as it only mentions, in a footnote, "[a]n argument *can be made* that the All Writs Act gives the district court the power to compel the telephone company's assistance." (Emphasis added). I sense a reluctance by the majority to fully adopt the Seventh Circuit's reasoning and hold that inherent power to require the telephone company to assist the government is found in the All Writs Act.

[2] 28 U.S.C. § 1651 provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

It is axiomatic that the All Writs Act does not provide an independent federal jurisdictional base but can only be used in aid of the court's jurisdiction.[3]

The majority opinion apparently rests original jurisdiction on some "inherent authority" in the district court "equivalent of the power to order a search warrant" under Fed. R. Crim. P. 41, to allow government installation of pen registers. Precedent for this reasoning is found in *Application of the United States,* 538 F.2d 956, 959 (2d Cir. 1976),[4] and *United States v. Illinois Bell Telephone Co., supra,* 531 F.2d at 812-13. These cases recognize that Fed. R. Crim. P. 41, the recognized rule governing the application and issuance of search warrants, will not aid the government in applying for a pen register for several reasons: (1) the rule governs search and seizure of tangible objects; (2) it provides the safeguard of authorized service of the

[3] As stated in *Application of the United States,* 407 F. Supp. 398 (W.D. Mo. 1976):

> Familiar principles state in cases such as *Brittingham v. U. S. Commissioner of Int. Rev.* (5 Cir. 1971), 451 F.2d 315, 317, need only to be stated in order to demonstrate that the government's All Writs Act contention is untenable. That case, as do many other cases, cites the leading Supreme Court and still other cases to support its statement of the following applicable general principles:
>
> > It is settled that this section, known as the All Writs Act, by itself, *creates* no jurisdiction in the district courts. It empowers them only to issue writs in aid of jurisdiction *previously acquired on some other independent ground.* [Emphasis ours] [Citations omitted] . . . .
>
> . . . the All Writs Act [does not] vest this Court with any independent jurisdictional power to design *ad hoc* procedures to authorize the use of a pen register device in connection with investigations of alleged offenses outside the scope of Title III.

407 F. Supp. at 405.

[4] Notwithstanding its finding of inherent authority to issue a search warrant, the Second Circuit finds that a district court, within his discretion, should not issue an order to compel the telephone company to assist the government without specific congressional authorization. *Application of the United States,* 538 F.2d 956, 962 (2d Cir. 1976).

warrant by a federal officer; and (3) it provides the safeguard of notice to the party concerned.[5] It is reasoned, however, that courts should be "practical" and recognize that Rule 41 may be disregarded as long as probable cause for the search exists. *Cf. United States v. Agrusa*, No. 76-1036 (8th Cir., filed July 6, 1976). The argument is, of course, that notice is not necessary where it would defeat the purpose of the search. *See Katz v. United States*, 389 U.S. 347 (1967); and *Ker v. California*, 374 U.S. 23 (1963).

All of this may be true, but Congress was cognizant of these facts when it passed Title III governing the circumstances when wire interception would be allowed. Under Title III, although notice, of course, is not required, additional safeguards are found in the strict rules of minimization and reporting of inventory within a fixed point of time. *See* 18 U.S.C. §§ 2518 and 2519.

Assuming, arguendo, that pen registers do not fall within the literal definition of interceptions[6] under Title III,[7] still, the only reasonable inference, based on the cumulative history of wiretap legislation,[8] is that the only wire interceptions to be author-

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[5] It is interesting to note that the government conceded before the district court in *Application of the United States, supra*, 407 F. Supp. at 402, that Fed. R. Crim. P. 41 was not applicable to a request for the installation of a pen register to investigate a crime not specified in Title III. The government also conceded they knew of no other authority which would allow the court to install a pen register outside of Title III.

[6] 18 U.S.C. § 2510(4) defines "intercept" as:

> [T]he *aural* acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device. (Emphasis added).

[7] This view is tenuous. *See* The Honorable John W. Oliver's discussion in *Application of the United States, supra*, 407 F. Supp at 406-07.

[8] Judge Oliver set forth this history:

> Established principles of statutory construction require courts to recognize that Congress does not legislate in a vacuum; Con-

ized are those subject to the safeguards of Title III. The Supreme Court decision in *Gelbard v. United States*, 408 U.S. 41 (1972), supports this view. Mr. Justice Brennan succinctly observed:

> In Title III, Congress enacted a comprehensive scheme for the regulation of *wiretapping* and *electronic* surveillance. See *United States v. United States District Court*, 407 U.S. 297, 301-306. Title III authorizes the interception of private *wire* and oral communications, but *only* when law enforcement officials are investigating specified serious crimes and receive prior judicial approval, an approval that may not be given *except upon compliance with stringent conditions*. 18 U.S.C. §§ 2516, 2518(1)-(8). If a *wire* or oral communication is intercepted in accordance with the provisions of Title III, the contents of the communication may be disclosed and used under certain circumstances. 18 U.S.C. § 2517. Except as expressly authorized in Title III, however, *all interceptions of wire* and oral communications are flatly prohibited. Unauthorized interceptions and the disclosure or use of information

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gressional legislation must be viewed in light of earlier legislation enacted in connection with the same subject matter and court decisions which have definitely determined the meaning and scope of that earlier legislation. Of particular significance, so far as Congressional action in regard to electronic surveillance is concerned, are the cases which considered whether pen register devices were within the coverage of Section 605, Title 47, U.S.C., which banned all forms of electronic surveillance. See *Nardone v. United States*, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314 (1937); *Weiss v. United States*, 308 U.S. 321, 60 S.Ct. 269, 84 L.Ed. 298 (1939); *Nardone v. United States*, (*Nardone II*), 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939); and *Benanti v. United States*, 355 U.S. 96, 78 S.Ct. 155, 2 L.Ed.2d 126 (1957). Every case which considered the precise question concluded that pen registers were embraced in the prohibition of Section 605. See Chief Judge Campbell's opinion in *United States v. Guglielmo* (N.D. Ill. 1965), 245 F. Supp. 534, affirmed *sub nom. United States v. Dote* (7 Cir. 1966), 371 F.2d 176 (opinion by Chief Judge Hastings), and *United States v. Caplan* (E.D. Mich. 1966), 255 F. Supp. 805 (opinion by then District, now Circuit Judge McCree). We believe that it must

> obtained through unauthorized interceptions are crimes, 18 U.S.C. § 2511(1), and the victim of such interception, disclosure, or use is entitled to recover civil damages, 18 U.S.C. § 2520. Title III also bars the use as evidence before official bodies of the contents and fruits of illegal interceptions, 18 U.S.C. § 2515, and provides procedures for moving to suppress such evidence in various proceedings, 18 U.S.C. § 2518-(9)-(10).

408 U.S. at 46 (emphasis added).

Where pen registers are authorized in conjunction with Title III intercepts, they are, of course, allowed and the safeguards of Title III apply. *See United States v. John*, 508 F.2d 1134 (8th Cir.), *cert. denied*, 421 U.S. 962 (1975); *United States v. Brick*, 502 F.2d 219 (8th Cir. 1974). Pen registers may also be used without court authority by the telephone companies for the limited purpose of policing their own equipment. *See United States v. Harvey*, 540 F.2d 1345 (8th Cir. 1976); *United States v. Dote*, 371 F.2d 176 (7th Cir. 1966). It may very well be, as the telephone company urges, that this is why Congress failed to specifically include pen registers under Title III. Nonetheless, when pen registers are sought to be used to

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> be assumed that Congress knew that pen register devices were included within the coverage of Section 605 of the Communications Act of 1934 (47 U.S.C. § 605), and that it knew that unless the pen register was taken out of the ban of Section 605, the use of such a device would still be prohibited. Section 803 of the Omnibus Crime Control and Safe Streets Act amended Section 605 to clearly reflect that all electronic surveillance is now to be governed by Title III. Senate Report No. 1097, reprinted 2 U.S.C. Code Congressional and Administrative News, 90 Cong., 2d Sess. at 2196, stated:
>
> > Section 803.—This section amends section 605 of the Communications Act of 1934 (48 Stat. 1103, 47 U.S.C. sec. 605 (1958)). This section is not intended merely to be a reenactment of section 605. The new provision is intended as a substitute The regulation of the interception of wire or oral communications in the future is to be governed by proposed new chapter 119 of title 18, United States Code.

Application of the United States, supra, 407 F. Supp. at 405-406.

investigate a crime included under Title III, as here (racketeering offense), compliance with either Title III or Rule 41 is the only means which provides constitutional safeguards for their use.

The majority's rationale is surely dangerous precedent. Judicial authority to compel a private party to assist the government in the invidious act of electronic surveillance should be based on defined authority. Wire interception of any communication constitutes a direct invasion of privacy. Congress initially outlawed all wire interceptions. Act of June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103 (Federal Communications Act) (amended 1968). Subsequently Congress carefully studied limited circumstances where wire interceptions could be utilized, subject to constitutional safeguards. The result of that study was the passage of Title III. Under that Act, Congress authorized wire interceptions for the investigation of specific crimes, as long as the safeguards of minimization and supervision by the court were evinced. It is troublesome to me that we now not only authorize government agents, but compel a resisting private corporate enterprise, to conduct pen register surveillance without court supervision. It is conceded by the parties that such surveillance can be abused and that private conversations on touch-tone telephones (as involved here) can be intercepted. *Cf. United States v. Harvey, supra.*

To me it is wrong that the judicial branch of government can thwart congressional intent and purpose by conjuring up some convenient, mystical authority through the pseudonym of "inherent power."

I would quash the order.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX B

United States Court of Appeals
for the Eighth Circuit

76-1725 September Term, 1977

In Re:

Application of the United States for an Order Authorizing Installation and Use of a Pen Register,

Southwestern Bell Telephone Company, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 18, 1977

APPENDIX C

United States Court of Appeals
for the Eighth Circuit

No. 76-1725 September Term, 1976

In Re:

Application of the United States for an Order Authorizing Installation and Use of a Pen Register,

Southwestern Bell Telephone Company, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

On motion of appellant, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

January 24, 1977

APPENDIX D

In the United States District Court for the
Eastern District of Missouri
Eastern Division

In Re:

Application of the United States for an Order Authorizing Installation and Use of a Pen Register. } No. 76 Misc. 58.

Order

In accordance with the Memorandum of this Court filed this date and incorporated herein,

It Is Hereby Ordered that the motion of Southwestern Bell Telephone Company to reconsider and withdraw this Court's Order of July 26, 1976, authorizing the installation and use of a pen register, be and is Denied; and

It Is Further Ordered that Southwestern Bell Telephone Company be and is held in contempt of this Court for failure to comply with this Court's Order of July 26, 1976; and

It Is Further Ordered that Southwestern Bell Telephone Company comply with this Court's Order of July 26, 1976; and

It Is Further Ordered that the compliance of Southwestern Bell Telephone Company with this Court's Order of July 26, 1976 be and is Stayed pending appeal.

Dated this 30th day of July, 1976.

/s/ H. KENNETH WANGELIN
United States District Judge

APPENDIX E

In the United States District Court for the
Eastern District of Missouri
Eastern Division

In Re:
Application of the United States for an Order Authorizing Installation and Use of a Pen Register, } No. 76 Misc. 58

Memorandum

This matter arises from an Order of this Court authorizing installation and use of a pen register and the motion of Southwestern Bell Telephone Company to reconsider and withdraw said Order and the application of the United States for an Order to Show Cause why Southwestern Bell Telephone Company should not be held in contempt for failure to obey the Order of this Court.

Findings of Fact

1. That on July 26, 1976, upon showing by the Government of probable cause, an Order was issued authorizing the installation and use of a pen register on a certain telephone line and further ordered Southwestern Bell Telephone Company to furnish certain information, leased lines and assistance.

2. That said Order was served upon Southwestern Bell Telephone Company on July 26, 1976, and Southwestern Bell Telephone Company has refused to comply.

3. That the pen register equipment to be utilized in this matter will be such that no voice interceptions on the telephone line can be made.

4. That the information, leased lines, and assistance requested and ordered are not available from any other source.

5. That for reasons of security of the equipment and security in execution of the Order, the leased lines are necessary, and the request for same is reasonable.

6. That without the information, leased lines and assistance the Federal Bureau of Investigation cannot carry out the Order of this Court.

Findings of Law

1. That pen register orders are not covered by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Title 18 U.S.C. Sections 2510-2520. *U.S. v. Illinois Bell Telephone Company*, 531 F.2d 809 (7th Cir., 1976); *U.S. v. Giordano*, 416 U.S. 505 (1974); *In Re Application of the United States in the Matter of a Pen Register*, No. 76-1155 (2nd Cir. Slip, July 13, 1976.

2. That pen register orders involve a search and seizure under the Fourth Amendment, and the Court may issue such an order upon a showing of probable cause. *U. S. v. Illinois Bell Telephone*, supra; *In Re Application*, supra.

3. That the Court has the inherent authority and power under the All Writs Act, Title 28 U.S.C. Section 1651(a), to compel the cooperation and assistance of Southwestern Bell Telephone Company to implement the use of a pen register. *U. S. v. Illinois Bell*, supra.

4. That compliance by Southwestern Bell Telephone Company with this Court's lawful order will be a complete defense to any claim of criminal or civil liability of Southwestern Bell Telephone Company.

Dated this 30th day of July, 1976.

/s/ H. KENNETH WANGELIN
United States District Judge

APPENDIX F

United States District Court
Eastern District of Missouri
Eastern Division

In Re: Application of the United States for an Order Authorizing Installation and Use of a Pen Register.	No. 76 Misc. 58

Order to Show Cause

Upon the application and affidavit of David W. Harlan, Assistant United States Attorney duly verified the 27th day of July, 1976, it is hereby

Ordered that Southwestern Bell Telephone Company show cause before this Court at 9:30 A.M. on the 29th day of July, 1976, or as soon thereafter as the same may be heard, at the United States District Court for the Eastern District of Missouri, 12th and Market Streets, St. Louis, Missouri, before the Honorable H. Kenneth Wangelin why Southwestern Bell Telephone Company should not be adjudged and held in contempt of the Court and punished for such contempt of this Court by reason of the fact that Southwestern Bell Telephone Company willfully and contemptuously disobeyed the Order of this Court commanding Southwestern Bell Telephone Company to provide certain information, technical assistance and telephone facilities to the Federal Bureau of Investigation. The matter will be submitted on memoranda to be submitted by the Parties.

/s/ H. KENNETH WANGELIN
United States District Judge

Dated this 27th day of July, 1976

APPENDIX G

United States District Court
Eastern District of Missouri

In the Matter of the Application of the United States of America for an Order Authorizing the Installation and Use of a Pen Register. } No. 76 Misc. 58

Motion to Reconsider and Withdraw Order Authorizing Trespass on Southwestern Bell Telephone Company Lines and Facilities and to Remove Southwestern Bell From the Provisions and Requirements of Said Order

Comes now Southwestern Bell Telephone Company and moves the Court to reconsider and withdraw its Order authorizing Installation and Use of a Pen Register, dated July 26, 1976, and for its Motion states:

1. The Order, in subparagraph (1), authorizes Special Agents of the Federal Bureau of Investigation to trespass upon the communications lines and property of Southwestern Bell for the purpose of installing mechanical devices commonly described as pen registers on telephone wires used by serve one of its customers. In this respect the Order requires a taking and appropriation of Southwestern Bell's property for public use without just compensation, and a taking of property without due process of law, both in violation of the 5th Amendment to the Constitution of the United States.

2. The designated customer has touch-tone dialing service and the outgoing telephone numbers are pulsed at voice frequency. Any interception and recording of the touch-tone pulses will also intercept and record all voice communications occurring on the line of the designated customer.

3. Subparagraph (2) of the Order specifically states that the Order does not authorize recording of voice communications but the Order does not require the use of devices that have no voice recording capability. Any tap of the line and connection with private line facilities of Southwestern Bell will transmit all voice communications occurring over the designated line to the offices of the Federal Bureau of Investigation. Moreover, the Order does not incorporate the protective provisions of Title 18 USCA §§ 2510-2520 which are applicable to interception of wire communications authorized under that statute.

4. The Order also requires Southwestern Bell to breach its contractual obligations with the designated customer by requiring Southwestern Bell to disclose information concerning the customer's service and participate in providing support facilities which will disclose the existence of customer communications and will invade the privacy of its customer's communications and, as such, is in contravention of the 4th and 5th Amendments of the Constitution of the United States and Title 18 USCA §§ 2510-2520.

5. The Order, on its face, is not issued pursuant to Title 18 USCA §§ 2510-2520 and consequently subjects Southwestern Bell to liability for civil damages, including punitive damages and attorney fees under Title 18 USCA § 2520 for participating in an unauthorized interception of wire communications.

6. The Order, on its face, requires Southwestern Bell to participate in activities which will result in the disclosure of the "existence" of communications transmitted by the designated customer and will cause it to violate Title 47 USCA § 605 and

subject it to criminal penalties provided in Title 47 USCA § 13, and does not come within the exception of 47 USCA § 605 for interceptions undertaken pursuant to 18 USCA §§ 2510-2520.

7. If the Order has been issued pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 USCA §§ 2510-2520, the Order is defective upon its face.

8. If the Order has purportedly been issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure, it is defective in that Rule 41 does not authorize the Court to direct persons other than "a civil officer of the United States authorized to enforce or assist in enforcing any law thereof, or to a person so authorized by the President of the United States" to carry out the provisions and requirements of a search warrant.

9. Even if the Order were properly directed to Southwestern Bell pursuant to Rule 41 of the said Federal Rules of Criminal Procedure and purports to be a search warrant authorized thereby, the Order is defective in that:

(a) It does not relate to search for or seizure of any property within the meaning of Rule 41(h); and

(b) is not required to be executed within 10 days as required by Rule 41(c).

Wherefore, Southwestern Bell Telephone Company moves the Court reconsider and withdraw its Order authorizing the installation and use of a pen register said Order being dated July 26, 1976, or in the alternative to modify its Order so as to not authorize agents of the Federal Bureau of Investigation to make any attachments to the lines of Southwestern Bell Telephone Company and to not require Southwestern Bell Telephone

Company to furnish applicant with assistance and facilities necessary to accomplish the interception.

SOUTHWESTERN BELL TELEPHONE COMPANY

By /s/ (Illegible)
LEO E. EICKHOFF, JR.
JOHN D. RAHOY
THAD HOLLIE, JR.
H. EDWARD SKINNER and
LINDA S. LEGG
Its Attorneys
100 North Twelfth Boulevard
St. Louis, Missouri 63101
Telephone: 247-5878

APPENDIX H

United States District Court
Eastern District of Missouri
Eastern Division

In Re:
Application of the United States for an Order Authorizing Installation and Use of a Pen Register, } No. 76 Misc. 58.

Application for an Order to Show Cause

Comes now the United States of America, by its attorneys and hereby applies to the Court for an Order to Show Cause why Southwestern Bell Telephone Company should not be found in contempt of this Court. In support of this application, Assistant United States Attorney David W. Harlan being duly sworn states as follows:

1. That on July 26, 1976, affiant applied to the Court on behalf of the United States of America for an order authorizing the installation and use of a pen register on a certain telephone.

2. That on the same date the Honorable H. Kenneth Wangelin signed an order authorizing the installation and use of a pen register and including an order to Southwestern Bell Telephone Company to furnish applicant "forthwith all facilities including leaselines, information, including the identification of leaseline pairs, subscriber pairs and the location of a suitable junction box where a caption can occur, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is providing. The furnishing of such facilities and technical assistance by the

Southwestern Bell Telephone Company is to be compensated for by applicant at the prevailing rates."

3. That on July 26, 1976, Special Agent William Ahler served a copy of said order upon Southwestern Bell Telephone Company.

4. That on July 27, 1976, Southwestern Bell Telephone Company, through Leo E. Eickhoff, Jr., its attorney, informed United States Attorney Barry A. Short that Southwestern Bell Telephone Company refused to comply with the order of this Court.

5. That as of the date and time of this application the Southwestern Bell Telephone Company has continued to refuse to comply with the order of this Court.

Wherefore, the United States of America requests the Court to issue an Order to Show Cause why said Southwestern Bell Telephone Company should not be held in a direct contempt of the lawful order of this Court.

BARRY A. SHORT
United States Attorney

/s/ DAVID W. HARLAN
Assistant United States Attorney

United States of America
Eastern Division of the
Eastern District of Missouri } ss.

I, David W. Harlan, Assistant United States Attorney for the Eastern District of Missouri, being duly sworn, do say that the information contained in the foregoing application is true to the best of my knowledge, information and belief.

/s/ DAVID S. HARLAN

Subscribed and sworn to before me this 27th day of July, 1976.

/s/ WILLIAM Q. RUND
Clerk, United States District Court

/s/ MURLENE A. THAYER
Deputy Clerk

APPENDIX I

United States District Court
Eastern District of Missouri
Eastern Division

In Re:
Order Authorizing Installation and Use of a Pen Register } No. 76 Misc. 58.

To: Special Agent Allan J. Rogers and other duly authorized Special Agents of the Federal Bureau of Investigation. United States Department of Justice

Affidavit having been made before me by Allan J. Rogers, Special Agent, Federal Bureau of Investigation, United States Department of Justice and full consideration having been given to the matters set forth therein, the Court finds:

(a) There is probable cause to believe that telephone number ..... located at ....., St. Louis, Missouri subscribed to by ..... has been and is now being used in connection with the commission of offenses in violation of Sections ....., Title 18, United States Code.

(b) There is probable cause to believe that evidence of the commission of the above-described offenses will be obtained through the installation of a device to register telephone numbers called from telephone number ..... located at ..... Avenue, St. Louis, Missouri and subscribed to by .....

Wherefore, it is hereby Ordered that Special Agent Allan J. Rogers and other duly authorized Special Agents of the Federal Bureau of Investigation, United States Department of Justice are authorized to

(1) Install mechanical devices commonly described as a pen register, on telephone number ..... located at ....., St. Louis, Missouri and subscribed to by .....;

(2) Record, by means of the mechanical device described above the telephone numbers of all outgoing calls dialed from the above-described telephone. This Order does not authorize the interception of voice communications taking place on the above-described telephones but authorizes only the interception of signals which disclose the numbers of outgoing calls;

(3) Such mechanical device may continue in operation for a period not to exceed thirty (30) days from the date of this Order or until the telephone numbers of all outgoing calls dialed lead to the location and identities of all persons committing the above-described offenses, whichever is earlier.

It is further ordered that the Southwestern Bell Telephone Company shall furnish the applicant forthwith all facilities including lease lines, information, including the identification of leased line pairs, subscriber pairs and the location of a suitable junction box where a connection can occur, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is providing. The furnishing of such facilities or technical assistance by the Southwestern Bell Telephone Company is to be compensated for by the applicant at the prevailing rates.

/s/ H. Kenneth Wangelin
United States District Judge

Dated this 26th day of July, 1976.

APPENDIX J

CONSTITUTION, STATUTES AND RULES INVOLVED

Act of June 29, 1940

Section 3771 of Title 18, United States Code, being the revised form of this provision in the Act of June 29, 1940, 54 Stat. 688, as amended, 18 USCA §3771, provides as follows:

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

All Writs Act

Section 1651 of Title 28, United States Code, 62 Stat. 944, as amended, commonly known as the All Writs Act, 28 USCA §1651, provides as follows:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Federal Rules of Criminal Procedure

Rule 41, Search and Seizure, Federal Rules of Criminal Procedure, provides as follows:

(a) **Authority to Issue Warrant.** A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) **Property Which May Be Seized With a Warrant.** A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

(c) **Issuance and Contents.** A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require

the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(d) **Execution and Return With Inventory.** The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) **Motion for Return of Property.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful pos-

session of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district or trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) **Motion to Suppress.** A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) **Return of Papers to Clerk.** The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) **Scope and Definition.** This rule does not modify any act, inconsistenf with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a. m. to 10:00 p. m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

Rule 57, Rules of Court, Federal Rules of Criminal Procedure, provides as follows:

(a) **Rules by District Courts.** Rules made by district courts for the conduct of criminal proceedings shall not be inconsistent

with these rules. Copies of all rules made by a district court shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.

(b) **Procedure Not Otherwise Specified.** If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

Communications Act of 1934

Section 605 of the Communications Act of 1934, 48 Stat. 1103, as amended by Section 803, Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 223, provides as follows:

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being en-

titled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.

Title III, Omnibus Crime Control and Safe Streets Act of 1968

Section 801, Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 112, provides as follows:

Sec. 801. On the basis of its own investigations and of published studies, the Congress makes the following findings:

(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and

private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce. The possession, manufacture, distribution, advertising, and use of these devices are facilitated by interstate commerce.

(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

(c) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communication should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.

Section 802, Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 112, added a new chapter at the end of Part I of Title 18, United States Code, 18 USC § 2510-2520, and as amended by the D.C. Court Reform Act, 84 Stat. 654, provides as follows:

Chapter 119—Wire Interception and Interception of Oral Communications

Sec.

2510. Definitions.

2511. Interception and disclosure of wire or oral communications prohibited.

2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited.

2513. Confiscation of wire or oral communication intercepting devices.

2514. Immunity of witnesses.

2515. Prohibition of use as evidence of intercepted wire or oral communications.

2516. Authorization for interception of wire or oral communications.

2517. Authorization for disclosure and use of intercepted wire or oral communications.

2518. Procedure for interception of wire or oral communications.

2519. Reports concerning intercepted wire or oral communications.

2520. Recovery of civil damages authorized.

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire,

cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any

individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other

proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who willfully—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of

such device for the purpose of the surreptitious interception of wire or oral communications.

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

§ 2513. Confiscation of wire or oral communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and

baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize

an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by deaths or by imprisonment for more than one year under sections 2274 though 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f) (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of em-

ployee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassinations, kidnaping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to when the application is made, when such interception may provide or has provided evidence of the commission of the offense of mur-

der, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular

description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving

interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

[*See main volume for text of (a) to (c)*]

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security in-

terest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception.

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section

2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such

portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from or order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

§ 2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

§ 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

Constitutional Provisions

The Fourth Amendment to the Constitution of the United States of America provides as follows:

Amendment IV—Searches and Seizures

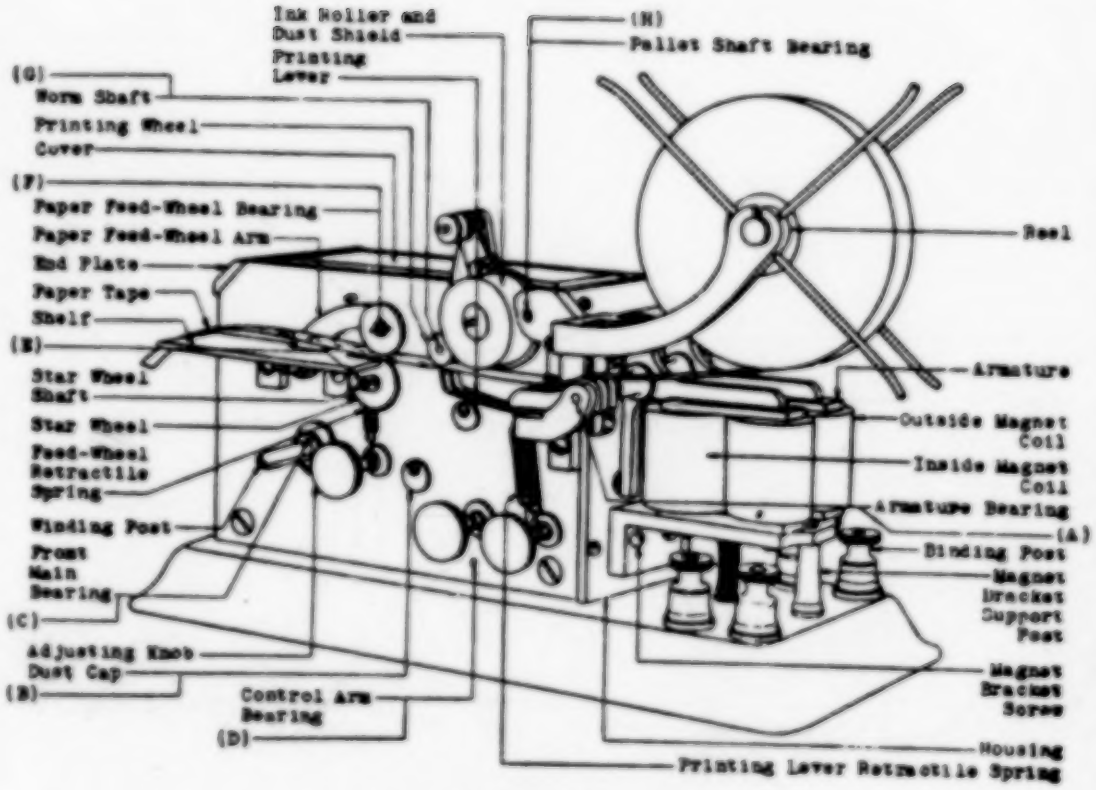
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States of America provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX K

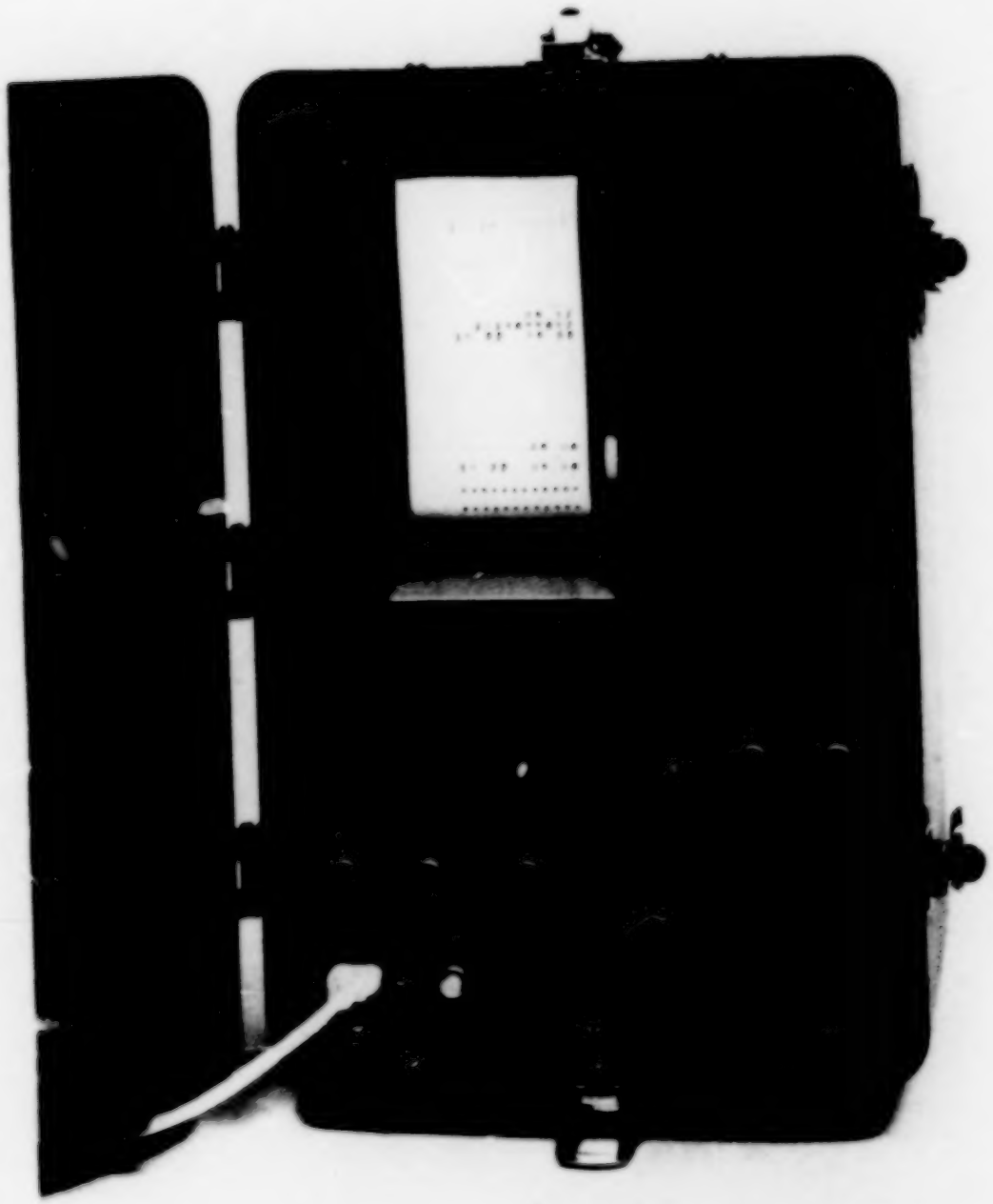
APPENDIX K



KS-3107 Pen Register

© American Telephone and Telegraph Company, 1962
Printed in U.S.A.

Pen Register manufactured by Foote-Pierson Company and J. H. Bunnell Company



Dialed Number Recorder manufactured by
Hekimian Laboratories, Incorporated

Supreme Court, U. S.
FILED
APR 18 1977
MICHAEL RODAK, JR., CLERK

No. 76-1157

In the Supreme Court of the United States

OCTOBER TERM, 1976

SOUTHWESTERN BELL TELEPHONE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1157

SOUTHWESTERN BELL TELEPHONE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that the district court exceeded its power in authorizing the government to use a pen register and in ordering petitioner to provide facilities and technical assistance necessary to carry out the pen register order.

On July 26, 1976, Judge H. Kenneth Wangelin of the United States District Court for the Eastern District of Missouri issued an order (Pet. App. A-29 to A-30) authorizing FBI agents to install a pen register[1] upon a

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[1]A pen register is a mechanical device that indicates when the telephone receiver is removed from the hook, and records the numbers dialed (Pet. App. A-1). Petitioner's statement (Pet. 21) that touch-tone decoders, which are similar to pen registers but are used on telephones having touch-tone dialing systems, "hear" the touch-tone sounds is incorrect. Touch-tone decoders simply respond to changes in electrical impulses, in the same manner as pen registers. Although petitioner

specified telephone based on his finding that there was probable cause to believe the telephone was being used in the commission of a racketeering offense in violation of federal law (Pet. App. A-2). The order authorized the use of a pen register until the telephone numbers of outgoing calls dialed from the subject telephone led to the identification of the persons committing the offense or until thirty days had elapsed from the date of the order, whichever occurred first (Pet. App. A-30). As part of the order, Judge Wangelin directed that petitioner Southwestern Bell Telephone Company, a wholly owned subsidiary of AT&T,[2] "shall furnish the applicant forthwith all facilities including lease lines, information, including the identification of leased line pairs, subscriber pairs and the location of a suitable junction box where a connection can occur, and technical assistance necessary to accomplish the interception unobtrusively," with compensation to be paid the company at the prevailing rates (Pet. App. A-30).

The district court, on the government's application, issued an order to show cause why the telephone company should not be held in contempt for refusing to comply with the pen register order (Pet. App. A-21); petitioner moved the district court to reconsider its pen register order and to remove petitioner from its provisions (Pet. App. A-22). On July 30, 1976, the district court denied the company's motion and held petitioner in contempt, although it

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correctly states (Pet. 21) that a volume unit meter would indicate that a conversation was in progress (but would not monitor the content of the conversation), neither pen registers nor touch-tone decoders come equipped with such meters; the addition of a volume unit meter to the pen register here would violate the court's order.

[2]Moody's *Public Utility Manual* 1941, 1946 (1976).

imposed no sanctions and stayed compliance with the pen register order pending appeal (Pet. App. A-18 and A-19). Petitioner appealed, and the court of appeals affirmed, with one judge dissenting (Pet. App. A-1 to A-15; 546 F. 2d 243).[3]

The questions presented by petitioner in this case are currently before the Court in *United States* v. *New York Telephone Company*, No. 76-835, certiorari granted, January 25, 1977. The only question presented in our petition in *New York Telephone Company* was whether a district court could order the telephone company to assist in implementing a valid pen register order. Respondent raised, in defense of the result reached below, the alternative ground that the district court had no authority to order the installation of pen registers except pursuant to 18 U.S.C. 2518. As we noted in our brief in *New York Telephone Company* (*id.* at 16-18),[4] we believe the Court has discretion to decide that issue, since acceptance of respondent's arguments would not change the ultimate result reached below. Cf. *Massachusetts Mut. Life Ins. Co.* v. *Ludwig*, 426 U.S. 479; *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n. 2. There is, accordingly, no need for this Court to afford plenary review of this case in order to reach the question of the propriety of the issuance of pen register orders without compliance with 18 U.S.C. 2518.

It is therefore respectfully submitted that consideration of this petition should be deferred pending this Court's

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[3]The court of appeals noted that it considered the finding of contempt "questionable" (Pet. App. A-3 n. 4).

[4]We are sending a copy of our brief to petitioner in this case.

decision in *United States* v. *New York Telephone Company*, No. 76-835.

WADE H. McCREE, JR.
Solicitor General.

APRIL 1977.

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